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Remittitur in Kentucky

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Kentucky squarely involving the question, the grantor's deed was avoided in an action at law.[32] While that is a very old case and stands by itself, the Court of Appeals has indicated in a late case that it would possibly follow the majority view on the question.[33]

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REMITTITUR IN KENTUCKY

Ordinarily the term remittitur is applied to a voluntary remission of part of the damages found by the jury. But in the Kentucky decisions, as well as those of some other states,[1] the setting aside of part of a separable verdict by the court when it has committed error by admission of certain evidence or by giving particular instructions resulting in an excessive verdict, has been called a remittitur.

I.

May the trial court give the recovering party the option of accepting a reduction of the verdict or submission to a new trial? In *Brown* v. *Morris*,[2] a malicious prosecution case, the plaintiff received a verdict. The defendant, alleging excessive damages, moved for a new trial. The court said a new trial would be granted unless the plaintiff would take one-fourth the verdict. Plaintiff objected but took judgment for the latter amount. Defendant appealed. The Court of Appeals reversed the holding of the trial court saying that in this instance the lower court had virtually assessed the damages, thereby depriving each party of his right to an assessment by a jury. The court in *Chattaroi Railroad Company* v. *Leftwitch*,[3] an action for wrongful death caused by the alleged wilful negligence of defendant's employees, cited *Brown* v. *Morris* and granted a new trial—the lower court had remitted, notwithstanding plaintiff's objection, $5,000 of a $9,000 verdict. *Louisville & Nashville Railroad Company* v. *Earl's Administratrix*,[4] another wrongful death case, is in accord. These cases indicate that where the recovering party objects to a remittitur when the verdict is for unliquidated damages and is inseparable, the trial court may not enter judgment for an amount less than that found by the jury.

The court in *Johnson's Administrator* v. *Johnson*[5] sustained a release of part of the verdict. Even though the plaintiff objected, the remittitur was held valid because the court assumed (the evidence

[32] Wall v. Hill's Heirs, 40 Ky. (1 B. Mon.) 290, 36 Am. Dec. 578 (1841).

[33] Transylvania University v. McDonald's Ex'r., 277 Ky. 608, 126 S. W. (2d) 1117, 1119 (1939).

[1] McCormick on Damages (1935) Section 19.

[2] 66 Ky. (3 Bush) 81 (1867).

[3] 7 Ky. Law Rep. 165, 13 Ky. Op. 480 (1885).

[4] 94 Ky. 368, 22 S. W. 607 (1893).

[5] 104 Ky. 714, 47 S. W. 883 (1898).

was not before it) that the lower court must have been able to pick out the particular items constituting the excess.

> 'If the court's instructions . . . failed to require the jury to omit from their findings the value of such property as, by reason of its nature, vested absolutely in the wife, and it was ascertainable from the proof what amount had in fact been allowed by the jury on account of such property, then the court could properly have required a reduction of the judgment to the extent of the value of such property."[6]

From this decision it appears that the court may on its own motion grant a new trial, unless the plaintiff submits to a stated remittitur, in those cases where the court can ascertain the amount allowed by the jury for specific items, when those items were by error of the court given or left to the jury. Hence it is not necessary in every case that the party recovering the verdict assent to the remittitur.

II.

May the party liable object to a remittitur? Where a verdict is flagrantly against the evidence, indicating that the jury was prejudiced or indifferent, the party liable may object to a remittitur as curing the verdict.[7]

It is uncertain whether the Court of Appeals would sustain a voluntary remittitur in a case of excessive unliquidated damages where there is no indication of misconduct or prejudice on the part of the jury nor a separable verdict containing items erroneously included. In a majority of the states which have passed upon this latter situation, a remittitur is allowed to cure the excess.[8]

Whether the remittitur shall be granted depends upon the determination of how far the defendant's right to an assessment of damages by a jury shall be carried. Many factors enter into a solution of the question, some of which are: the number of cases pending in the trial court, the amount involved in the controversy, the cost—both to the public and the parties—of further or prolonged litigation, and the substantial necessity for a new trial to properly determine the rights of the respective parties. Statutes providing for summary jurisdiction in specified types of cases show that a jury trial may, when impractical, be dispensed with in order to economize and to expedite litigation. It should be noted that the courts have the power to determine

[6] 104 Ky. 714, 719, 47 S. W. 883, 884 (1898).

[7] Merrick v. Holt, 8 Ky. Law Rep. 162. "The entire verdict is impeached as a product of a spirit that infuses into every part of it the taint of positive wrong or reckless indifference. It may be that proof of its prevalence can be found most readily in the excessive amount of damages; but when by that or other manifestation its existence is sufficiently shown, it is not seemly to compel the injured party to submit to a verdict so brought forth." *Id.* at 165.

[8] See Note (1928) 53 A. L. R. 779, at 783; McCormick on Damages (1935) Sec. 19; 46 Corpus Juris 429.

whether a verdict is excessive; then as a practical solution why not permit the court to say what amount will not be excessive?[9] Some courts take the position that a judgment entered after the remittitur is still a jury finding because it is evident that they considered the plaintiff damaged to the extent of the lesser amount when they rendered a verdict for a greater sum.[10] Some courts admit that the rule permitting a remittitur is illogical but justify it by saying that it is necessary to put an end to litigation and that everyone has a constitutional right to receive promptly that which is justly due him.[11]

Do the Kentucky cases furnish any basis from which we may predict the probable solution of the following question? Is a remittitur permissible in a case of unliquidated damages when neither the jury nor trial court is at fault, except that the jury's estimate of the damages is excessive in the opinion of the court? Although this issue was raised in *Otte* v. *Otte*,[12] the court placed its decision upon the assumption (the evidence was not before the court) that the trial court had granted the remittitur in accord with the rules that prevail in this jurisdiction. The court stated the prevailing rule in this jurisdiction, namely that

> ". . . when the jury has acted upon the facts, and found a verdict, sustained by the evidence and the instructions, there may be remission that will cure the error of the court in giving instructions which produced the excess in damages, whenever it can be attributed to the error of the court; and it is upon the party claiming under the verdict to make this showing."[13]

But this rule does not necessarily exclude other possible situations in which a remittitur might be granted. Furthermore the court makes no positive statement that a remittitur in case of unliquidated damages is against the decisions of this state; but it says that

> "It was not ruled (in Brown v. Morris, 3 Bush 81, a malicious prosecution case; or in Louisville & Nashville Railroad Company v. Earl's Administratrix, a wrongful death case) that the court was without power with the consent or on the motion of the recovering plaintiff to remit a portion of the sum of the recovery fixed by the verdict of the jury."[14]

Though the court cites *Masterson* v. *Hagan*[15] for dicta that "had the court submitted to the jury only the question of damages for physical and mental suffering, then the plaintiff, in order to avoid a new trial, could not have remitted a part of the judgment"[16] a reading of the case fails to disclose any such language.

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[9] See Nicholds v. Crystal Plate Glass Co., 126 Mo. 55, 28 S. W. 991, 994 (1894).

[10] See International & G. N. R. Co. v. Wilkes, 68 Tex. 617, 5 S. W. 491 (1887).

[11] See Belt R. Co. v. Charters, 123 Ill. App. 322 (1905).

[12] 259 Ky. 741, 83 S. W. (2d) 42 (1935).

[13] 259 Ky. 741, 743, 83 S. W. (2d) 42, 44 (1935).

[14] 259 Ky. 741, 743, 83 S. W. (2d) 42, 44 (1935).

[15] 56 Ky. (17 B. Mon. 325) 259 (1856).

[16] 259 Ky. 741, 744, 83 S. W. (2d) 42, 44 (1935).

Louisville & Nashville Railroad Company v. *Earl's Administratrix*,[17] *Chattaroi Railroad Company* v. *Leftwitch*[18] and *Brown* v. *Morris*[19] have been referred to as holding that, where there is no positive criterion for determining the excess damage, a remittitur is denied,[20] but on analysis the cases will not support such a broad rule. In *Brown* v. *Morris*, an action for malicious prosecution, the plaintiff objected to remission of $3,000 from a $4,000 verdict; and the Court of Appeals reversed the holding of the lower court. Though the case contains words from which we might conclude that a remittitur is denied in a suit for unliquidated damages where there is no positive criterion for determining the excess damage,[21] they must be viewed in the light of the entire case. The fact that the court in 1867 knew "no precedent for overruling a motion for a new trial on terms required of the party opposing it"[22] is to be accounted for by the fact that remittitur has largely developed since that date. *Chattaroi Railroad Company* v. *Leftwitch*, and *Louisville & Nashville Railroad Company* v. *Earl's Administratrix* are cases, like *Brown* v. *Morris*, in which the recovering party objected to the remittitur. The *Earl* case contains dicta that a remittitur will not be allowed in a wrongful death case:

> "Both parties complain, and it is evident that if the company were entitled to a new trial, it should have been granted without the imposition of any terms; if not, the appellee should have had her judgment in pursuance of the jury finding."[23]

Cases in which the defendant seeks a new trial alleging that the verdict is excessive, but where remittitur is not involved, may have some bearing on our problem. In *Louisville Gas Company* v. *Page*[24] the court said:

> "The mere fact that the court would not have fixed the compensation as high as a jury has done is no reason for setting the verdict aside and granting a new trial. To justify the court in doing so, the verdict must be so excessive as to induce the belief that it was caused by the passion or prejudice of the jury."

In *Snyder* v. *Louisville Railway Company*,[25] a personal injury case, the court stated that the trial court does not have the discretionary right to grant a new trial because the verdict appears to be excessive, unless it is so glaringly disproportionate to the damages as to appear at first blush to have resulted from passion or prejudice. The court concludes in *Rose* v. *Edmonds*,[26] another personal injury case, that the amount of

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[17] 94 Ky. 368, 22 S. W. 607 (1893).
[18] 7 Ky. Law Rep.. 165, 13 Ky. Op. 480 (1885).
[19] 66 Ky. (3 Bush) 81 (1867).
[20] 46 Corpus Juris 429, New Trials, Section 499.
[21] "In this instance the court itself virtually assessed the damages, and thereby deprived each party of his right to an assessment by a jury." 66 Ky. (3 Bush) 81, 83 (1867).
[22] 66 Ky. (3 Bush) 81, 83 (1867).
[23] L. & N. R. Co. v. Earl's Admx., 94 Ky. 368, 371, 22 S. W. 607, 608 (1893).
[24] 27 Ky. Law Rep. 885, —, 86 S. W. 1112, 1113 (1905).
[25] 150 Ky. 816, 150 S. W. 986 (1912).
[26] 271 Ky. 36, 111 S. W. (2d) 427 (1937).

damages in such cases is peculiarly within the province of the jury, and that the court would not set aside the verdict as excessive unless it was plainly the result of passion or prejudice. In view of the foregoing holdings it would seem that remittitur is improper in personal injury cases, since a trial court abuses its discretion by setting aside a verdict as excessive unless it is so flagrantly excessive as to appear the result of passion or prejudice, and if the latter is present a remission will not cure the defect. However, remittitur was not in issue in these cases.

Although the decisions of this State have settled only a few problems concerning remittitur, the following conclusions are ventured.

(a) The trial court may on its own motion without the assent of the recovering party remit that portion of the verdict representing separable items, the amounts of which are known or are ascertainable, where those items were erroneously submitted to the jury.

(b) The defendant must be granted a new trial where the verdict is flagrantly against the evidence, or where there is proof of ample prejudice, passion, or indifference on the part of the jury.

(c) It is uncertain whether the party liable may except to a voluntary remittitur in a case of unliquidated damages where the court finds no fault with the verdict except that the jury's estimate of the damages exceeds the amount it thinks might properly have been found.

CLARENCE CORNELIUS.

CONVEYANCES OF LAND IDENTIFIED BY MONUMENTS OF APPRECIABLE WIDTH

When property is conveyed and identified by monuments of appreciable width, the question arises as to the particular part of the monument that is to control. The problem is raised most frequently when the boundary is a highway, private way, or water course, and it is the purpose of this note to discuss briefly the construction to be put upon such a conveyance in Kentucky.

In the case of *Blalock* v. *Atwood*,[1] the court said that a conveyance of land bounded on a public way carried with it the fee to the center of such way, unless a contrary intention appeared upon the face of the instrument or from the circumstances. The court gave the reason for such a holding as being that the purchaser of the lot, doubtless, would not have purchased it but for the usual benefits of the street; therefore,

[1] 154 Ky. 39, 157 S. W. 694 (1913). Accord: City of Fordyce v. Hampton, 179 Ark. 705, 17 S. W. (2d) 869 (1929); Bowers v. Atchison T. & S. F. Ry. Co., 119 Kan. 202, 237 Pac. 913 (1925); Schnieder v. Jacob, 86 Ky. 101, 5 S. W. 350 (1887); Henry v. Board of Trustees of Dioceses of Kentucky, 207 Ky. 846, 270 S. W. 476 (1925); Campeggi v. Wakefield, 157 Md. 229, 145 Atl. 546 (1929); Land v. Brooks, 241 Mich. 452, 217 N. W. 34 (1928); Hunter v. Van Kueren, 224 N. Y. Supp. 153 (1927); Vanderbilt University v. Williams, 152 Tenn. 664, 280 S. W. 689 (1926); MacCorkle v. City of Charleston, 105 W. Va. 395, 142 S. E. 841 (1935); Spence v. Frantz, 195 Wis. 69, 217 N. W. 700 (1928).